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Before the Federal Communications Commission

En Banc Hearing on America Online, Inc. and Time Warner, Inc.

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Good afternoon Chairman Kennard and Commissioners Ness, Tristani, Powell, and Furchtgott-Roth. I appreciate this opportunity to appear before you today regarding this important proposed merger between AOL and Time Warner. I am the Senior Assistant City Attorney for the City of Irving, Texas, which has reviewed and approved the request filed by Time Warner for the transfer of ownership to the new AOL Time Warner entity. I am also a former member of the Board of the National Association of Telecommunications Officers and Advisors (NATOA). As I am sure you are aware, NATOA represents local governments across the country in the provision of cable and telecommunications services. NATOA's members currently represent over 432 local governments across the country with approximately 20 million cable subscribers within their jurisdictions. Of these local governments, 75 are served by Time Warner Cable or one of its affiliates, and represents almost 7 million of Time Warner subscribers nationwide.

While I realize that this proposed merger will particularly affect Internet services, video and other related broadband services the companies may offer, my particular areas of concern lie in the provision of cable television and broadband telecommunications services. I take this opportunity today to speak not only on behalf of my own community of Irving, but also on behalf of my sister jurisdictions across the country represented by NATOA, many of whom have similar issues relating to this particular transaction.

My community and NATOA, along with its many members and other local jurisdiction officials, are firmly committed to the protection of citizen and consumer services within our communities. Local governments are confident that through the promotion of competition of service providers, rapid and managed deployment of broadband services, and the successful evolution of the

telecommunications industry, consumers of these technologies will surely be the winners in this new digitally-driven millennium.

Policymakers are at the threshold of an era when the development and deployment of broadband services, coupled with the explosive growth of the Internet, 500+ cable channels and an ever-increasingly Internet-based economy dictates that the decisions made now will definitively affect the competitive future of communications services within our communities. By maximizing the partnership and shared responsibilities that exist between local governments and state and federal authorities, we should thoughtfully consider and realize the importance of adopting policies and making important decisions that will foster the rapid and managed deployment of broadband services. This consideration must occur in a manner that will realize the potential of the converging technologies of video, telephony and high-speed data through these types of mergers. One of the decisions that will have to be made through this partnership is the issue of competitive access to cable operator's high-speed broadband networks for the provision of Internet and other cable services.

One of the policy platforms adopted by NATOA and its members almost five years ago indicates that our members support "*the effective use of wired and wireless information technologies to provide the benefits of advanced telecommunication services. Local governments must work to promote open, connective, and universal technical standards for all telecommunication equipment, services, and system architectures.*" Upon reviewing this policy, NATOA adopted an Interim Policy on Open Access more than a year ago to assist its members who were struggling with this very issue. That Policy indicates that "the provision of Internet services over cable is a 'cable service.' This means it is subject to the requirements of the local cable television franchise and to regulation by the local franchise authority, as permitted in the Federal Cable Act of 1984, as amended." Further, the Policy reminds our members that a "local franchise authority has the legal right and jurisdiction under Federal law to consider competition in the provision of Internet services over cable, at certain times or as the result of certain trigger events, including franchise transfer or renewal. A local franchise authority is not obligated to exercise this jurisdiction as a condition of a franchise transfer or renewal. Rather, competition in the

provision of Internet service over cable is one of the many issues that may be considered by a local franchise authority as it determines what is appropriate in the public interest in light of community needs." The statement continues that in the absence of federal guidance on this issue, "a local franchise authority can consider the local public interest impact of competition vs. exclusivity in the provision of Internet services over cable." Further, NATOA has indicated that it "will continue to review all of the policy arguments being urged to ascertain whether a broad national policy governing open provision of Internet services is warranted. Until such a national policy is proposed, debated, and adopted, NATOA suggests that local officials analyze the question in light of the local community's needs and interests and act as they always must – in the best interests of their local constituents."

First, I would like to address the issue regarding the provision of high-speed Internet services over the cable facility. Most of the cable systems throughout the country have approached the provision of Internet services over the cable facility as cable service. They have entered into franchise agreements and have made a business decision to use this particular regulatory model for their business purposes. These decisions were made by the companies, not by the federal government, and not by the localities. Whether you reach the issue of "open access," this definition is one that need not disrupted. We are aware of the opinion of the United States Court of Appeals for the 9th Circuit. If a cable company chooses to conduct its business in a fashion that subjects it to certain federal regulatory authority, then that business decision can bind the company. It is the choice of the company as to whether the provision of Internet access service is provided in a manner that subjects it to Title II Common Carrier regulations as telecommunications service, or, in a manner consistent with Title VI Cable Service regulations. Where a company has affirmatively stated that its provision of Internet service is consistent with and is governed by the statutory and regulatory strictures of Title VI, the local governments with whom they have negotiated a franchise agreement must be able to rely upon such assertions.

Similarly, when companies such as AOL and Time Warner make public statements regarding their proposed merger, and their business plans for the provision of high-speed Internet service over the cable facility, local governments must be able to not only rely on such assertions, but also seek affirmation during the transfer process. My community, along with many others who

are or have reviewed this transfer request, have taken the parties to the transaction at their word – we have relied upon their published Memorandum of Understanding, and we have placed requirements within our enabling ordinances to ensure that our communities receive the benefits to be garnered from such a marriage. This action has not been dealt with consistently by Time Warner. While we are aware that in certain communities, such as Irving, the provision has been incorporated without extraordinary objection, there are other communities in which Time Warner is taking the position that they will not be held to such public statements and will resist any attempt to include language in authorizing ordinances. Time Warner and AOL need to be consistent. Our citizens deserve no less, and our governments deserve to hold the companies to their promises.

We have taken this action within Irving, as others have taken it elsewhere, because we have an obligation to do today what will affect our constituents, not tomorrow, but for the next five, ten or fifteen years. It is incumbent upon us, as the delegated public officials, to ensure that our communities are not left on the poor side of the digital divide. We take actions today that may seem bold or over-reaching, but we take them to serve and to protect the rights, the needs and the long-term success of our citizens and our communities at large. While I appreciate the opportunity to appear before you today on behalf of so many, you must realize, understand and appreciate, that what you are doing today – holding a public hearing – is what we do every time a transaction such as this comes before our community. Where you have a discrete group of invited speakers to address those topics your staff have identified as most relevant – we have the public at large – our citizens, our consumers questioning our public officials and their staffs. We do not select those who choose to speak – they have a right to do so, and we have an obligation to listen. The only area within the Commission that I believe receives an equivalent amount of direct public contact is probably your call center. I wonder how many of you have sat in that hot seat – not the one before the Congressional committee, or in the White House advisor's office – but the one on the other end of a live phone conversation with a confused, frustrated or irate citizen who just wants their one small problem solved?

Their problem in more and more places – is that they want the broadband services that are available today – they want the speed that comes with that service; but they are still limited in the

availability of that service. You might think that DSL technology is going to be a rapid response. But, let me be perfectly clear – it is not the phone companies providing DSL that most of my citizens will have access to – it is the provision of high-speed Internet access over the cable facility that they will access first. In Irving, as in many other communities, the deployment of DSL has been focused on the business community. However, the cable facility is already in place, with some upgrades continuing, but far and wide the most prevalent means of gaining high-speed access within my community will be over the cable platform. The question that remains is whether those within my community to gain access over that cable facility will be able to use the Internet service provider of their choice, and whether they will have to pay twice for the privilege of doing so.

As Professor Orton has addressed, once they have this new high-speed service over the cable platform, they will need and deserve consumer protection standards that ensure the best possible service from their provider of choice. The consumer also needs protection from business practices that reduce the value of the service the consumer receives. By owning both the facility and the content, these two companies have tremendous control over what the citizens in my community will be able to see over television and computer screens. I would ask the Commission to further consider what the distinctions will be between the delivery of video over the cable system, and delivery of video over the cable facility as transmitted by AOL-TV. I cannot claim to know the answer, but certainly the cities around the country that receive this service are curious. And be sure, the citizens within our communities will also be curious.

We all have to ask ourselves whether or not this merger is truly in the best interest of American consumers. Does allowing one of the largest cable operators in the country to unite with the largest Internet Service Provider in the world promote competition in any marketplace? Will consumers be better served by paving the way for a very large part of the country to be served by a single provider?

When you consider the entire scope of interests held by each of these two entities – from General Motors, Hughes and DirecTV to AOL-TV and ICQ on the one hand; to cable systems, music, publishing, broadcasting, cable programming services and Internet service through Road Runner

on the other hand, due diligence and caution must drive the review and consideration of this merger if, in fact, expanded services, competition and ultimately consumers are among the principal priorities.

For many of my colleagues within NATOA, cable franchise laws give local franchise authorities the legal basis to protect all consumers from anti-competitive behavior. Surely, the digital divide is a very real, serious and growing concern for all of us. When we concentrate the means of accessing the Internet for consumers, and potentially limiting the competitive nature of the industry, there is greater pressure to protect consumers at all levels. The prospect of combining the owner of the facility with the owner of the content with the owner of the access should be carefully reviewed for all possible protections and limitations to ensure that consumers are not deprived of the best possible competitive outcomes.

The question is whether this merger will continue in the spirit of protecting access to competition, the Internet and the rapid and managed growth of the telecommunications industry in the name of consumers. In conclusion, I urge you to exercise the utmost care in considering the long-range impact of the merger and know that we will be responsible for the impact of this merger on communities – deep in all areas of our communities – long after this merger is completed.

Statement of Cathy Cunningham
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